

APPEAL NO. 032428
FILED NOVEMBER 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 1, 2003. The hearing officer determined that appellant (claimant) sustained a compensable injury on _____; that the compensable injury includes a paracentral disc protrusion at C5-6; that the injury does not include a posterior disc bulge at C3-4, a right sided herniation at C6-7, or right shoulder outlet impingement with symptomatic acromioclavicular joint and associated glenoid labrum tear; that claimant's employer did not tender a bona fide offer of employment; that claimant had disability from September 16 through December 20, 2002; and that respondent self-insured (carrier herein) did not waive the right to contest the compensability of the claim. Claimant appealed the determinations that: (1) carrier did not waive the right to contest the compensability of the claimed injury; (2) the injury does not extend to a posterior disc bulge at C3-4, a right sided herniation at C6-7, or right shoulder outlet impingement with symptomatic acromioclavicular joint and associated glenoid labrum tear; and (3) claimant did not have disability from May 31 through June 14, 2002, or from May 24 through July 23, 2003. Claimant also contends that carrier should not be permitted to reopen the compensability of the shoulder injury and asserts that the hearing officer did not have jurisdiction to consider the issue regarding extent of injury and the right shoulder. Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part, reverse and render in part, and reverse and remand in part.

Claimant contends the hearing officer erred in determining that carrier did not waive the right to contest the compensability of the claimed injury. Section 409.021(a) provides, in pertinent part, that an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission and the employee in writing of its refusal to pay benefits. It is not clear when carrier received written notice of the claimed injury and the hearing officer did not make a determination in this regard. We will assume for the purposes of this appeal that carrier received written notice of the claim on May 31, 2002, as it stated on the two Payment of Compensation or Notice of Refused/Dispute Claim (TWCC-21s) in the record. The hearing officer determined that carrier initiated medical benefits on May 31, 2002, when the claimant sought medical treatment with Dr. D. However, there is no evidence in the record that carrier took any action of any kind within the seven-day period. There is evidence that claimant went to Dr. D for treatment on May 31, 2002, but nothing in the record showed that carrier stated that it would pay medical or any benefits within the seven-day period. Carrier asserts on appeal that it never contested the compensability of the claim, so waiver does not apply. We disagree. Carrier also asserts that it "sent"

claimant to Dr. D, so this is evidence that it initiated medical benefits. However, claimant testified that he found Dr. D in the phonebook and that he was sent to another clinic by employer. He did not say that carrier “sent” him to Dr. D or paid for medical treatment. Further, even if a claimant were directed to go to a medical provider, this is not an action showing that a carrier has initiated benefits or taken sufficient action within the seven-day period such that waiver would be avoided. We conclude that carrier has waived the right to contest the compensability of the claimed injury. We now address what the claimed injury includes.

In a May 31, 2002, “employee statement,” claimant said the part of the body injured was the neck and upper right shoulder. Therefore, the “claimed injury” included the shoulder and carrier waived the right to contest the compensability of the shoulder injury. Further, from the very beginning, claimant was treated for a neck strain. Therefore, carrier waived and is liable for a neck strain as part of the “claimed injury.”

Regarding the issue of extent of injury, claimant contends the hearing officer erred in determining that the injury does not extend to or include a right shoulder injury. Claimant contends that carrier should not be permitted to recast the primary issue in this case so that carrier’s waiver is rendered meaningless. Claimant also asserts that the hearing officer did not have jurisdiction to find the injury did not include a shoulder injury. The legal consequence of the waiver in this case is that carrier may not now prevail on an issue regarding extent of injury that concerns the claimed injury itself. Carrier waived the right to contest the compensability of the right shoulder, and cannot now prevail on an extent issue regarding the shoulder injury. We reverse the hearing officer’s determination that the injury does not extend to right shoulder outlet impingement with symptomatic acromioclavicular joint and associated glenoid labrum tear and render a decision that the injury does extend to right shoulder outlet impingement with symptomatic acromioclavicular joint and associated glenoid labrum tear. Because we have determined that the shoulder injury is compensable, we need not address claimant’s contention regarding whether extent of injury to the shoulder was properly raised in the benefit review conference report.

Claimant contends that carrier should not be permitted to “reopen” the issue of compensability of the shoulder injury. We note that a carrier is required to take some action within seven days of receiving written notice of an injury in order to even be entitled to reopen the issue of compensability based on newly discovered evidence. See Texas Workers’ Compensation Commission Appeal No. 030380-s, decided April 10, 2003.

Claimant contends the hearing officer erred in determining that the injury did not extend to a posterior disc bulge at C3-4 or a right-sided herniation at C6-7. Carrier waived and is liable for the claimed injury, which was specified within the seven-day period as a neck strain. Regarding whether it extended to the above-named spinal conditions, this issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer’s determination in this regard is supported by the record and is not so

against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant contends the hearing officer erred in determining that he did not have disability from May 31, 2002, through June 14, 2002. The hearing officer determined that claimant had work restrictions during that period and that "claimant chose to utilize his annual and sick leave benefits and received his pre-injury wages." It appears that the hearing officer determined that claimant did not have disability because of the use of claimant's sick time. However, if claimant used his sick leave during this period, it would not mean he did not have disability, though carrier could get a credit regarding temporary income benefits. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 129.2(c)(4) (Rule 129.2(c)(4)) states that post-injury earnings (PIE) shall include "the value of any full days of accrued sick leave or accrued annual leave that the employee has voluntarily elected to use after the date of injury." Conversely, Rule 129.2(d)(2) provides that PIE shall not include "any sick leave or accrued annual leave that the employee did not voluntarily elect to use." The hearing officer's decision does not indicate that Rule 129.2 was considered and we must remand for the hearing officer to determine whether claimant was able to earn his preinjury wage during this period of time. The hearing officer may also make findings regarding whether claimant did or did not voluntarily elect to use his sick leave during that period.

Claimant contends the hearing officer erred in determining that he did not have disability for the period from May 24 through July 23, 2003. The hearing officer determined that due to the "claimed right shoulder injury," claimant was unable to obtain or retain employment at wages equivalent to his preinjury wages beginning on May 24, 2003, through July 23, 2003. Because we have rendered a decision that the claimed shoulder injury is compensable, we also render a decision that claimant had disability from May 24 through July 23, 2003.

We reverse that part of the hearing officer's decision that determined that carrier did not waive the right to contest the compensability of the claimed injury and render a decision that carrier waived the right to contest the compensability of the claimed neck strain and shoulder injury. We reverse that part of the hearing officer's decision that determined that the injury does not extend to right shoulder outlet impingement with symptomatic acromioclavicular joint and associated glenoid labrum tear and render a decision that the injury extends to right shoulder outlet impingement with symptomatic acromioclavicular joint and associated glenoid labrum tear. We affirm that part of the hearing officer's decision that determined that the injury does not extend to a posterior disc bulge at C3-4 or a right sided herniation at C6-7. We reverse that part of the hearing officer's decision that determined that claimant did not have disability from May 31 to June 14, 2002, and remand for the hearing officer to reconsider this determination consistent with this decision. We reverse that part of the hearing officer's decision that determined that claimant did not have disability from May 24 to July 23, 2003, and render a decision that claimant had disability from May 24 to July 23, 2003.

According to information provided by carrier, the true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**ARMANDO CHAPA
CITY SECRETARY
1201 LEOPARD
CORPUS CHRISTI, TEXAS 78401.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Panel
Manager/Judge

DISSENTING OPINION:

I respectfully dissent. I would hold that with regard to carrier waiver and the neck injury, that carrier waived and is liable for the posterior disc bulge at C3-4 and a right-sided herniation at C6-7. I would also hold that, because of this waiver, the hearing officer erred in determining that the injury does not extend to the posterior disc bulge at C3-4 and a right-sided herniation at C6-7. Otherwise, I concur in the decision as written.

Edward Vilano
Appeals Judge